

SENATE BILL 1153

By Tracy

AN ACT to amend Tennessee Code Annotated, Title 12,
relative to public private partnership contracts.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the “Partnership for Public Facilities and Infrastructure Act.”

SECTION 2. Tennessee Code Annotated, Title 12, is amended by adding the following language as a new chapter:

12-12-101.

(a) The General Assembly finds that:

(1) There is a public need for timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, and installation of public infrastructure and government facilities within the state that serve a public need and purpose;

(2) Such public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, operated, implemented, and installed;

(3) There are inadequate resources to develop public infrastructure and government facilities for the benefit of citizens of the state, and there is demonstrated evidence that public-private partnerships can meet these needs by leveraging and supplementing the limited public funds available for public projects and providing other benefits to the public;

(4) Financial incentives exist under state and federal tax law that promote public entities to enter into partnerships with private entities to develop qualifying projects; and

(5) Authorizing private entities to develop or operate one or more qualifying projects may result in the availability of such projects to the public in a more timely or less costly fashion, thereby serving the public safety, benefit, and welfare.

(b) Nothing in this chapter shall be construed to delegate the power of eminent domain to any private entity with respect to any project commenced or proposed pursuant to this chapter. This chapter does not alter the eminent domain laws of this state or grant the power of eminent domain to any person who is not expressly granted that power under other state law.

12-12-102.

As used in this part, unless the context otherwise requires:

(1) "Affected local jurisdiction" means any county, municipality, or school system in which all or a portion of a qualifying project is located;

(2) "Appropriating body" means the body responsible for appropriating or authorizing funding to pay for a qualifying project;

(3) "Comprehensive agreement" means the comprehensive agreement between the private entity and the responsible public entity described in § 12-12-110;

(4) "Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct, operate, maintain or expand;

(5) "Material default" means any default by the private entity in the performance of its duties under the comprehensive agreement that jeopardizes adequate service to the public from a qualifying project;

(6) "Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity, or other business entity;

(7) "Public entity" means any state board, commission, authority or department as well as any municipality, county or other political subdivision;

(8) "Qualifying projects" means any project that meets a public purpose and has previously been identified as a public need by the elected or appointed leaders of the state and its political subdivisions, including, but not limited to, school systems, local governments, state and local authorities, and higher education institutions;

(9) "Responsible public entity" means a public entity that has the power to develop the applicable qualifying project;

(10) "Revenues" means all revenues, income, earnings, user fees, lease payments, or other service payments arising out of or in connection with supporting the development or operation of a qualifying project; and

(11) "User fees" mean the rates, fees or other charges imposed by the private entity of a qualifying project for use of all or a portion of such qualifying project pursuant to the comprehensive agreement.

12-12-103.

(a) The public entity responsible for the development or operation of a qualifying project shall issue guidelines prior to approving any project or accepting a proposal under this chapter.

(b) Guidelines shall be reasonable, promote competition and guide the selection of projects by the public entity. They shall include, at a minimum, the following:

(1) Reasonable criteria for choosing among competing proposals;

(2) Financial review and analysis procedures, performed by financial and technical advisors or consultants, that shall include, at a minimum, a cost-benefit analysis, an assessment of opportunity cost, lifecycle costs, and consideration of the results of relevant studies and analyses related to the proposed qualifying project;

(3) Procedures for consideration of the nonfinancial benefits of a proposed project;

(4) Suggested timelines for selecting proposals and negotiating an interim or comprehensive agreement according to § 12-12-110;

(5) Procedures to determine the adequacy of the information released when seeking competing proposals as under § 12-12-106 and provide for the enhancement of that information, if deemed necessary, to encourage competition;

(6) Criteria, key decision points, and approvals required to ensure that the responsible public entity considers the extent of competition before selecting proposals and negotiating an interim or comprehensive agreement;

(7) Criteria for determining any fees authorized in § 12-12-105 that the public entity elects to charge; and

(8) Process for posting and publishing of public notice of a private entity's request for approval of a qualifying project, including:

(A) Specific information and documentation to be released regarding the nature, timing, and scope of the qualifying project submitted pursuant to § 12-12-105(b) and protection of confidential and proprietary information provided by the private entity under § 10-7-504(a)(7);

(B) A reasonable time period as determined by the responsible public entity to encourage competition and public-private partnerships in accordance with the goals of this chapter, such reasonable period not to be less than forty-five (45) days, during which time the responsible public entity shall receive competing proposals pursuant to § 12-12-106(d);

(C) A process for posting procurement under this section on a procurement registry of the state; and

(D) For local government projects, confirmation that the public notice complies with applicable local laws and regulations.

12-12-104.

(a) The Partnership for Public Facilities and Infrastructure Act guidelines committee is established to prepare model guidelines for public entities in the implementation of the chapter. Such guidelines shall be prepared for the purpose of creating consistent requirements for private entities who seek to participate in the construction or development of a qualifying project throughout the state. These guidelines shall be mandatory for all state agencies conducting projects under this chapter, but shall be optional for local government entities and boards of education acting under this chapter so long as local guidelines are consistent with this chapter.

(b) The committee shall be composed of eleven (11) persons as follows:

(1) The following members appointed by the governor:

(A) A county official;

(B) A municipal official;

(C) A member of a local board of education;

(D) The commissioner of the department of general services; and

(E) Three (3) members of the business community.

(2) Two (2) members of the house of representatives, appointed by the speaker of the house; and

(3) Two (2) members of the senate, appointed by the speaker of the senate.

(c) The terms of these committee appointments shall be for two (2) years. The committee shall meet once a month or as needed and shall issue model guidance to public entities no later than July 1, 2014. Such guidance shall be updated every two (2) years. The members of the committee shall elect a chair and a vice-chair who shall serve two (2) year terms in such office.

(d) All legislative members of the committee, citizen members, and state officials or employees shall serve without compensation, but may be reimbursed for actual expenses, including travel expenses as provided for in the comprehensive travel regulations promulgated by the department of finance and administration.

(e) Staff support shall be provided by the department of general services, the governor's office, the department of finance and administration, the house of representatives, the senate, and the office of legal services.

12-12-105.

(a) The responsible public entity may request proposals or invite bids from private entities for the development of qualifying projects according to procedures set forth in § 12-12-108.

(b) A private entity may also initiate approval of a qualifying project by the responsible public entity by submitting a proposal requesting approval to the responsible public entity according to the procedures set forth in § 12-12-106(a). Any such proposal shall be accompanied by the following material and information:

(1) A project description, including the location of the qualifying project, the conceptual design of such facility or facilities or a conceptual plan for the provision of services or technology infrastructure;

(2) A feasibility statement that includes:

(A) The method by which the private entity proposes to secure any necessary property interests required for the qualifying project;

(B) A list of all permits and approvals required for the qualifying project from local, state, or federal agencies; and

(C) A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the private entity to accommodate such crossings.

(3) A schedule for the initiation and completion of the qualifying project to include the proposed major responsibilities and timeline for activities to be performed by both the public and private entity as well as a proposed schedule for obtaining the permits identified in subdivision (b)(2)(B);

(4) A financial plan setting forth the private entity's general plans for financing the qualifying project including the sources of the private entity's funds and identification of any dedicated revenue source or proposed debt or equity investment on the behalf of the private entity; a description of user fees, lease payments, and other service payments over the term of the interim or comprehensive agreement pursuant to § 12-12-109 or § 12-12-110 and the methodology and circumstances for changes to such user fees, lease payments, and other service payments over time;

(5) A business case statement that shall include a basic description of any indirect and direct benefits that the private entity can provide in delivering the qualified project including relevant cost, quality and time frame data;

(6) The names and addresses of the persons who may be contacted for further information concerning the request; and

(7) Such additional material and information as the responsible public entity may reasonably request.

(c) The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing and evaluating the proposal under subsection (b), including without limitation, reasonable attorney's fees and fees for financial, technical, and other necessary advisors or consultants as prescribed by § 12-12-103.

(d) Any private entity submitting a proposal to a responsible public entity under subsection (b) shall notify each affected local jurisdiction by furnishing a copy of its proposal to each affected local jurisdiction.

(e) Each affected local jurisdiction that is not a responsible public entity for the respective qualifying project may, within sixty (60) days after receiving the private entity proposal under subsection (d), submit any comments it may have in writing on the proposed qualifying project to the responsible public entity and indicate whether the facility is compatible with local plans and budgets. Such comments shall be given consideration by the responsible public entity prior to entering an interim or comprehensive agreement with a private entity pursuant to § 12-12-109 or § 12-12-110. 12-12-106.

(a) Any private entity seeking authorization under this chapter to develop a qualifying project shall first obtain approval of the responsible public entity. Such private entity may initiate the approval process by requesting approval pursuant to § 12-12-

105(b) or the responsible public entity may request proposals or invite bids pursuant § 12-12-105(a).

(b) Any facility, building, infrastructure or improvement included in a proposal as a part of a qualifying project shall be identified specifically or conceptually.

(c) Upon receipt by the responsible public entity of a proposal submitted by a private entity initiating the approval process pursuant to § 12-12-105(b), the responsible public entity shall determine whether to accept such proposal for consideration in accordance with the factors in § 12-12-107(a). If the responsible public entity determines not to accept for consideration the proposal submitted by the private entity pursuant to § 12-12-105(b), it shall return the proposal, together with all accompanying fees and documentation, to the private entity.

(d) If the responsible public entity chooses to accept a qualifying project submitted according to § 12-12-105(b), the responsible public entity shall make such project public according to the guidelines consistent with § 12-12-103 and shall seek competing proposals through open competition. In seeking competing proposals, the responsible public entity shall take action appropriate under § 10-7-504(a)(7) to protect confidential and proprietary information provided by the private entity. Public notices of such request shall be made at least forty-five (45) days prior to the date set for receipt of proposals by posting the legal notice on the state's procurement registry. All proposals then submitted for qualifying projects shall be evaluated according to § 12-12-108, prior to entering into a comprehensive agreement with a private entity for the qualifying project

(e) The responsible public entity may reject any proposal initiated by a private entity pursuant to § 12-12-105(b) at any time.

12-12-107.

(a) The responsible public entity may grant approval of the development of a qualifying project, if the responsible public entity determines that:

(1) There is a public need for or benefit derived from the qualifying project of the type the private entity proposes as a qualifying project;

(2) The estimated cost of the qualifying project is reasonable in relation to similar facilities; and

(3) The private entity's plans will result in the timely development or operation of the qualifying project.

(b) The approval of the responsible public entity shall be subject to the private entity entering into an interim or comprehensive agreement pursuant to § 12-12-109 or § 12-12-110 with the responsible public entity.

(c) Nothing in this chapter or in an interim or comprehensive agreement entered into pursuant to this chapter shall be deemed to enlarge, diminish or affect the authority, if any, otherwise possessed by the responsible public entity to take action that would impact the debt capacity of the state.

12-12-108.

A responsible public entity may enter into a comprehensive agreement only in accordance with guidelines adopted by it under § 12-12-103. A responsible public entity may enter into a comprehensive agreement through a process of competitive negotiation, where permitted, under § 12-3-208 or competitive design build procurement under § 12-10-124. Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one (1) factor in evaluating the proposals received. Other factors that may be considered include:

(1) The proposed cost of the qualifying facility;

- (2) The general reputation, industry experience, and financial capacity of the private entity;
- (3) The proposed design of the qualifying project;
- (4) The eligibility of the facility for accelerated selection, review, and documentation timelines under the responsible public entity's guidelines;
- (6) Local citizen and government comments;
- (7) Benefits to the public;
- (8) The probable scope, complexity, or priority of the project;
- (9) Risk sharing, including guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the private entity;
- (10) An increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available;
- (11) The private entity's compliance with a minority business enterprise participation plan;
- (12) The private entity's plans to employ local contractors and residents; and
- (13) Other criteria that the responsible public entity deems appropriate.

12-12-109.

Prior to or in connection with the negotiation of the comprehensive agreement, the responsible public entity may enter into an interim agreement with the private entity proposing the development or operation of the qualifying project. Such interim agreement may:

(1) Permit the private entity to commence activities for which it may be compensated relating to the proposed qualifying project, including, but not limited to, project planning and development, design and engineering, environmental analysis and mitigation, survey, and ascertaining the availability of financing for the proposed facility or facilities;

(2) Establish the process and timing of the negotiation of the comprehensive agreement; and

(3) Contain any other provisions related to any aspect of the development or operation of a qualifying project that the parties may deem appropriate.

12-12-110.

(a) Prior to developing or operating the qualifying project, the private entity shall enter into a comprehensive agreement with the responsible public entity.

(b) The comprehensive agreement shall include:

(1) A thorough description of the duties of each party in the completion and operation of the qualifying project;

(2) Dates and schedules for the completion of the qualifying project;

(3) Any user fees, lease payments, or service payments as may be established by agreement of the parties as well as any process for changing these fees or payments throughout the term of the agreement as well as a copy of any service contract;

(4) Any reimbursements to be paid to the responsible public entity for services provided by the responsible public entity;

(5) A process for the review of plans and specifications for the qualifying project by the responsible public entity and approval by the responsible public entity if the plans and specifications conform to reasonable standards acceptable

to the responsible public entity. This shall not be construed as requiring the private entity to complete design of a qualifying project prior to the execution of a comprehensive agreement;

(6) A process for the periodic and final inspection of the qualifying project by the responsible public entity to ensure that the private entity's activities are acceptable to the responsible public entity in accordance with the provisions of the comprehensive agreement;

(7) Delivery of maintenance, performance and payment bonds, letters of credit or other form of security acceptable to the responsible public entity in connection with the development or operation of the qualifying project, for those components of the qualifying project that involve construction;

(8) Submission of a policy or policies of public liability insurance, copies of which shall be filed with the responsible public entity accompanied by proofs of coverage, or self-insurance, each in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying project;

(9) A process for monitoring of the practices of the private entity by the responsible public entity to ensure that the qualifying project is properly maintained;

(10) The filing of appropriate financial statements to the responsible public entity on a periodic basis; and

(11) Policies and procedures governing the rights and responsibilities of the responsible public entity and the private entity in the event the comprehensive agreement is terminated or there is a material default by the

private entity. Such policies and procedures shall include conditions governing assumption of the duties and responsibilities of the private entity by the responsible public entity and the transfer or purchase of property or other interests of the private entity by the responsible public entity. Such policies and procedure shall be consistent with § 12-12-111.

(c) The comprehensive agreement may include such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter and to which the private entity and the responsible public entity mutually agree, including, without limitation, provisions regarding unavoidable delays or provisions providing for a loan of public funds to the private entity to develop one or more qualifying projects. The comprehensive agreement may also contain provisions where the authority and duties of the private entity under this chapter shall cease, and the qualifying project is dedicated to the responsible public entity or, if the qualifying project was initially dedicated by an affected local jurisdiction, to such affected local jurisdiction for public use.

(d) Any changes in the terms of the comprehensive agreement, as may be agreed upon by the parties from time to time, shall be added to the comprehensive agreement by written amendment.

(e) The comprehensive agreement may provide for the development of phases or segments of the qualifying project.

12-12-111.

(a) In the event of a material default by the private entity, the responsible public entity may terminate, with cause, the interim or comprehensive agreement and exercise any other rights and remedies that may be available to it at law or in equity, including, but not limited to, claims under the maintenance, performance, payment bonds or other forms of security; or letters of credit required by § 12-12-110(b)(7)

(b) The responsible public entity may elect to assume the responsibilities and duties of the private entity of the qualifying project, and in such case, it shall succeed to all of the right, title and interest in such qualifying project, subject to any liens on revenues previously granted by the private entity to any person providing financing thereof;

(c) The power of eminent domain shall not be delegated to any private entity with respect to any project commenced or proposed pursuant to this chapter. Any responsible public entity having the power of condemnation under state law may exercise such power of condemnation to acquire the qualifying project in the event of a material default by the private entity. Any person who has provided financing for the qualifying project, and the private entity, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

(d) In the event the responsible public entity elects to take over a qualifying project pursuant to subsection (b), the responsible public entity may develop the qualifying project, impose user fees, impose and collect lease payments for the use thereof and comply with any service contracts as if it were the private entity. Any revenues that are subject to a lien shall be collected for the benefit of and paid to secured parties, as their interests may appear, to the extent necessary to satisfy the private entity's obligations to secured parties, including the maintenance of reserves. Such liens shall be correspondingly reduced and, when paid off, released. Before any payments to, or for the benefit of, secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the qualifying project, including compensation to the responsible public entity for its services in operating and maintaining the qualifying project. The right to receive such payment, if any, shall be considered just compensation for the qualifying project. The full faith and credit of the

responsible public entity shall not be pledged to secure any financing of the private entity by the election to take over the qualifying project. Assumption of operation of the qualifying project shall not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenues from the qualifying project.

12-12-112.

(a) Any financing of a qualifying facility may be in such amounts and upon such terms and conditions as may be determined by the parties to the interim or comprehensive agreement. Without limiting the generality of the terms and conditions of the financing, the private entity and the responsible public entity may propose to utilize any and all funding resources that may be available to them and may, to the fullest extent permitted by applicable law, issue debt, equity, or other securities or obligations, enter into leases, access any designated trust funds, borrow or accept grants from any state infrastructure bank, and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying facility.

(b) The responsible public entity may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this chapter and may enter into any contracts required to receive such assistance. The responsible public entity may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying project to be paid, directly or indirectly, from the proceeds of a grant or loan made by the local, state, or federal government or any agency or instrumentality thereof.

12-12-113.

In addition to any authority otherwise conferred by law, any public entity may contract with a private entity for the delivery of services to be provided as part of a

qualifying project in exchange for such service payments and other consideration as such public entity may deem appropriate.

12-12-114.

Nothing in this chapter shall alter the eminent domain laws of this state or grant the power of eminent domain to any person who is not expressly granted that power under other state law. Any public entity may dedicate any property interest, including land, improvements, and tangible personal property, that it has for public use in a qualifying project if it finds that so doing will serve the public purpose of this chapter by minimizing the cost of a qualifying project to the public entity or reducing the delivery time of a qualifying project. In connection with such dedication, a public entity may convey any property interest that it has, subject to the conditions imposed by general law governing such conveyances, to the private entity subject to the provisions of this chapter, for such consideration as such public entity may determine. The aforementioned consideration may include, without limitation, the agreement of the private entity to develop the qualifying project. The property interests that the public entity may convey to the private entity in connection with a dedication under this section may include licenses, franchises, easements, or any other right or interest the public entity deems appropriate.

12-12-115.

Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of any responsible public entity or any affected local jurisdiction or any officer or employee thereof with respect to the participation in, or approval of all or any part of the qualifying project or its operation, including, but not limited to, interconnection of the qualifying project with any other infrastructure or project.

12-12-116.

Any police officers of the public entity and of each affected local jurisdiction shall have the same powers and jurisdiction within the limits of such qualifying project as they have in their respective areas of jurisdiction and such police officers shall have access to the qualifying project at any time for the purpose of exercising such powers and jurisdiction.

12-12-117.

Nothing in this chapter shall abrogate the obligations of a responsible public entity or private entity to comply with public meetings requirement in accordance with the open meeting requirements contained in title 8, chapter 44 or to disclose public information in the public records act, compiled in title 10, chapter 7.

SECTION 3. This act shall take effect July 1, 2013, the public welfare requiring it.